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No. 235

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IN THE

Supreme Court of the United States

October Term, 1958

SANGAMON VALLEY TELEVISION CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV, INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., AND PLAINS TELEVISION CORPORATION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., IN OPPOSITION

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	2
ARGUMENT	7
CONCLUSION	15

TABLE OF CASES

Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358	14
Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470	14
Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 298 U.S. 266	14
Huntington Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 222, 192 F.2d 33 (1951)	13
Jacksonville Journal Co. v. Federal Communications Commission, 101 U.S. App. D.C. 12, 246 F.2d 699 (1957)	5
National Broadcasting Co. v. United States, 319 U.S. 190	8

STATUTES

Communications Act of 1934, as amended	
Section 303(g) (47 U.S.C. Sec. 303(g))	2, 7, 11, 14
Section 307(b) (47 U.S.C. Sec. 307(b))	2, 7, 14
Section 402(a) (47 U.S.C. Sec. 402(a))	7
Judicial Code	
Section 1254(1) (28 U.S.C. Sec. 1254(1))	2
Judicial Review Act of 1950, as amended	
Section 1038 (5 U.S.C. Sec. 1038)	7

MISCELLANEOUS

PAGE

Television Allocation Proceedings of the FCC:
22 FCC Reports 293 (Vail Mills) 12
22 FCC Reports 307 (Elmira) 12
22 FCC Reports 318 (Springfield-St. Louis) 1, 3, 6
1 Pike & Fisher, Radio Regulation, Pt. III, pp. 91:97-98 3
1 Pike & Fisher, Radio Regulation, Pt. III, pp. 91:606 3
1 Pike & Fisher, Radio Regulation, Pt. III, pp. 91:661-665 4
8 Pike & Fisher, Radio Regulation 541 8
13 Pike & Fisher, Radio Regulation 1522 5
13 Pike and Fisher, Radio Regulation 1571 ..... 5, 6, 10, 11, 12

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No. 235

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v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV, INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., AND PLAINS TELEVISION CORPORATION, *Respondents*.

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BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-2a) is reported at 255 F.2d 191. The Report and Order of the Federal Communications Commission there affirmed is reported in 22 FCC Reports 318 (1957), *sub nom. Television Allocations in Springfield, Ill.-St. Louis, Mo. Areas* (J.A. 183-209).

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1958. The petition for certiorari was filed on July 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission, deleting VHF Channel 2 and substituting UHF channels therefor in Springfield, Ill., a predominantly UHF area, encouraged "the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)).

2. Only in the event the foregoing question is answered in the negative is petitioner in a position to complain of the reassignment of Channel 2 elsewhere, and to raise the issue whether the reassignment of Channel 2 to St. Louis and Terre Haute contravened Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)).

STATUTE INVOLVED

Section 303(g) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 303(g)), provides:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—
>
> . . . . . .
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .

STATEMENT

The instant petition for certiorari, filed by a defeated applicant for Channel 2 in Springfield, Ill. (whose appeal from a decision of the Federal Communications Commis-

sion preferring another applicant is still pending in the court below),[1] arises from the Commission's Report and Order released March 1, 1957 (22 FCC Reports 318; J.A. 183-209) "deintermixing" Springfield, Ill., St. Louis, Mo. and Terre Haute, Ind.—by removing VHF Channel 2 from Springfield (a predominantly UHF area) and substituting UHF Channels 26 and 36 therefor, and reassigning VHF Channel 2 to St. Louis and Terre Haute (predominantly VHF areas). That Report and Order, as reaffirmed by the Commission on rehearing (J.A. 240-256), has in turn its antecedents which explain and (respondent believes) justify the action here challenged:

In its spectrum allocation report in 1945 the Commission made it clear that the 13 VHF channels (later reduced to 12), which it there set aside for commercial television use, were insufficient to provide a nationwide competitive television system, and accordingly reserved a substantial portion of the UHF band for *experimental* television purposes.[2] In its Sixth Report of April 14, 1952, issued after a four-year study (1948-1952), the Commission added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels (Channels 2 through 13) theretofore set aside for regular television broadcast use.[3] Basic to this report, allocating specific channels to named cities (see 1 RR ¶ 53:606), was the assumption (then justified but disproved by subsequent developments) that the "intermixture" and utilization of VHF and UHF channels in the same major markets would compel the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course

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[1] See Petition, p. 7, fn. 10.

[2] Report in FCC Docket No. 6651, Mimeo 82387, May 1945 (see 1 Pike and Fisher, *Radio Regulation*, Pt. III, pp. 91:97-98, hereinafter cited as —— RR ——).

[3] See Sixth Report of April 14, 1952, I RR Pt. III, 91:606-607 (para. 22).

"an integral part of a *single*, nationwide television service" (para. 197).[4]

Pursuant to the intermixture policy thus embodied in its 1952 Report, the Commission allocated three VHF channels (Channels 4, 5 and 11) and three UHF channels (Channels 30, 36, and 42) to St. Louis, Mo., one VHF (Channel 2) and one UHF (Channel 20) to Springfield, Ill., and one VHF (Channel 10) and one UHF (Channel 63) to Terre Haute, Ind. for commercial use.

A VHF-UHF pattern soon developed in these three markets typical of the United States as a whole: With the advent of a *second* VHF station in the large St. Louis market, two UHF stations in that area ceased to operate; with a VHF station going on the air first, the UHF channel "went begging" in the smaller Terre Haute market; and with a UHF station commencing operation ahead of the VHF applicants (delayed by a comparative hearing) Station WICS on UHF Channel 20 provided a satisfactory television service in Springfield, Ill. (see J.A. 65, 66, 69). It thus became apparent (under the 1952 "intermixture" policy) that in the larger markets with the advent of a *second* VHF operation, and in the smaller markets with the advent of a *first* VHF station, the UHF stations were ceasing to provide a television service (see J.A. 76-78, 79-88). In short, unless corrective steps were taken, it was evident that the 70 UHF channels would go to waste (see J.A. 63-75).

Accordingly, commencing in 1954, the Commission was flooded with petitions proposing a basic change in allocation philosophy—from that of "intermixture" to a policy of "deintermixture"—in which it was urged (see J.A. 84-85) that ungranted VHF channels in areas where UHF had proved successful be shifted to VHF areas where

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[4] Sixth Report of April 14, 1952, 1 RR Pt. III, 91:661-665. Emphasis supplied throughout this brief.

UHF stood no chance of gaining a toehold, thereby ensuring more service from UHF stations (in UHF areas) and more service from VHF stations (in VHF areas). Among such petitions was one by respondent Plains Television Corporation, licensee of Station WICS, asking that Springfield be made all-UHF and that Channel 2 be reassigned to St. Louis and Terre Haute (see 13 RR 1522, 1525; cf. J.A. 21-26).

After a series of rule-making proceedings, the Commission finally concluded in its Second Deintermixture Report of June 26, 1956 in Docket No. 11532 (13 RR 1571) that intermixture was not producing an integrated television system, that the 12 VHF channels were insufficient for a "fully competitive television system" (13 RR 1571, 1575, para. 12), that VHF operations were thwarting the development of a satisfactory service on UHF in a number of markets, and "that the intermixture of UHF and VHF channels was, on a nation-wide basis, a failure."[5] Pending a further study of the advisability and feasibility of moving all television into the UHF band (thus eliminating the intermixture problem), the Commission also concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, on a case-to-case basis, whether the deletion of VHF channels in predominantly UHF areas would "improve the opportunities for effective competition among a greater number of stations" (13 RR 1571, 1581, para. 31). To that end the Commission, concurrently with its June 26, 1956 Report, instituted some 13 rule-making proceedings designed to "deintermix" a number of areas where it appeared that UHF (if not smothered by VHF competition) would provide a satisfa tory

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[5] See *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699, 700 (1957). By 1956 there was "near unanimity" among responsible segments of the industry that "intermixture" had proved a mistake, and that a policy of "deintermixture" should be substituted therefor. See J.A. 85.

service (see 13 RR 1571, 1583-1584). Among the proceedings thus instituted was one (Docket No. 11747) to remove VHF Channel 2 from Springfield, substituting two additional UHF channels therefor and utilizing Channel 2 in St. Louis, a market obviously destined to become all-VHF and in need of additional television service (J.A. 1-2).

In an interim report released July 23, 1956, the Senate Committee on Interstate and Foreign Commerce (which had been closely following the UHF-VHF deintermixture problem) strongly endorsed the Commission's action in Docket No. 11532 and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted with a view to deintermixing particular markets (J.A. 79-88).

After a careful study of the voluminous comments filed by interested persons in Docket No. 11747, the Commission on March 1, 1957 released a Report and Order (22 FCC Reports 318) in which it found (in line with the five criteria spelled out in its Second Deintermixture Report) that the deletion of Channel 2 from Springfield would not result in any significant numbers of people being deprived of a television service (J.A. 189-190, para. 11); that several stations were providing a UHF service to the area (including Station WICS in Springfield and Station WTVP in Decatur, some 37 miles from Springfield) (J.A. 188-189, para. 8); that 85%-100% of the sets in the nine counties around Springfield were capable of receiving UHF signals (J.A. 189, para. 9); that the flat terrain of central Illinois was ideally suited to UHF propagation (J.A. 189, para. 10); and that the deletion of Channel 2 would result in more service rather than less service in the Springfield-Decatur area (J.A. 198-199, para. 24). The Commission accordingly concluded that the public interest would be served (1) by deleting Channel 2 from Springfield and making that market all-UHF; and (2) by reassigning

Channel 2 to both St. Louis (where it would provide a needed fourth service) and to Terre Haute (where it would provide a second competitive service) (J.A. 183-209). Following the denial by the Commission of a petition for rehearing (J.A. 240-256), Sangamon Valley Television Corporation petitioned the court below for review under 47 U.S.C. Sec. 402(a), raising a single issue whether the Commission's action "deintermixing" Springfield-St. Louis-Terre Haute contravened Section 307(b) of the Communications Act of 1934 as amended (47 U.S.C. Sec. 307(b)).

American Broadcasting-Paramount Theatres, Inc. (ABC), a television network which has been handicapped by its inability to obtain outlets comparable to those enjoyed by the other two television networks (National Broadcasting Company and Columbia Broadcasting System), and which supported the Commission's proposals to provide additional service in key markets through "deintermixture," including the Springfield-St. Louis-Terre Haute proposal (Docket No. 11747), intervened in the court below (pursuant to 5 U.S.C. Sec. 1938), contending that the action deleting Channel 2 from Springfield (even if it had not been reassigned elsewhere) was in the public interest, under Section 303(g), and implemented rather than contravened Section 307(b) of the Communications Act (47 U.S.C. Secs. 303(g) and 307(b)). From a per curiam affirmance of the Commission's action Sangamon seeks certiorari.

ARGUMENT

I.

American Broadcasting-Paramount Theatres, Inc. is the owner and operator of a nationwide television network (ABC). Its network programs are made available to viewers in various parts of the United States through its owned-and-operated stations in five major markets and

PAGE

Section 402(a) (47 U.S.C. Sec. 402(a)) 7
Section 402(b) (47 U.S.C. Sec. 402(b)) 7
Section 402(e) (47 U.S.C. 402(e)) 8
Section 402(j) (47 U.S.C. Sec. 402(j)) 2
Section 405 (47 U.S.C. Sec. 405) 8
Judicial Code
Section 1254(1) (28 U.S.C. Sec. 1254(1)) 2
Judicial Review Act of 1950, as amended
Section 1038 (5 U.S.C. Sec. 1038) 8

MISCELLANEOUS

Television Allocation Proceedings of the FCC:
22 FCC Reports 293 (Vail Mills) 10
22 FCC Reports 307 (Elmira) 10
22 FCC Reports 342 (1957) 2, 3, 6
22 FCC Reports 1039 (1957) 2, 7
23 FCC Reports 61 (1957) 3, 7
1 Pike & Fisher, Radio Regulation, 53:606 4
1 Pike & Fisher, Radio Regulation, Pt. III, pp. 91:97-98 3
1 Pike & Fisher, Radio Regulation, Pt. III, pp. 91:606 4
1 Pike & Fisher, Radio Regulation, Pt. III, pp. 91:661-665 ..... 4, 8
11 Pike & Fisher, Radio Regulation 533 ..... 2, 3
13 Pike & Fisher, Radio Regulation 1571 ..... 5, 9, 10, 12
Senate Report No. 2769, 84th Cong. 3d sess. 6, 9

IN THE

Supreme Court of the United States

October Term, 1958

No. 242

WIRL TELEVISION COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ILLIWAY TELEVISION, INC.; WMBD, INC.; TELE-VIEWS NEWS COMPANY, INC.; AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.; WEST CENTRAL BROADCASTING COMPANY; HILLTOP BROADCASTING COMPANY; and MID ILLINOIS TELEVISION COMPANY, *Respondents.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for The District of Columbia Circuit

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BRIEF FOR AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Petitioner's App. A)[1] is reported at 253 F.2d 863. The actions of the Federal Communications Commission there affirmed (J.A. 109-128;

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[1] In reprinting the opinion below as Appendix A to the Petition for Certiorari, petitioner (without offering any explanation therefor) has omitted the court's explanatory footnotes.

J.A. 128-130; J.A. 131-137) are reported, respectively, in 22 FCC Reports 342 (1957), 11 Pike and Fisher, Radio Regulation,[1] 533, 607-608 (1956), and 22 FCC Reports 1039 (1957).

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1958. A petition for rehearing was denied May 5, 1958. The petition for certiorari was filed on July 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1), and 47 U.S.C. Sec. 402(j).

QUESTIONS PRESENTED

1. Whether the action of the Federal Communications Commission, deleting VHF Channel 8 and substituting UHF channels therefor in Peoria, Ill., a predominantly UHF area, encouraged "the larger and more effective use of radio in the public interest" (47 U.S.C. Sec. 303(g)).

2. Only in the event the foregoing question is answered in the negative is petitioner in a position to complain of the reassignment of Channel 8 elsewhere, and to raise the issue whether the allocation of Channel 8 to Rock Island-Davenport-Moline contravened Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)).

3. Whether petitioner, who received a construction permit for Channel 8 in Peoria conditioned on the outcome of a rule-making proceeding then pending to delete Channel 8, was improperly refused an evidentiary hearing.

STATUTE INVOLVED

Section 303(g) of the Communications Act of 1934, as amended (47 U.S.C. 303(g)), provides:

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[1] Hereinafter cited as —— RR ——.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

. . . . .

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . .

STATEMENT

The instant petition for certiorari stems principally from a Report and Order of the Federal Communications Commission, released March 1, 1957 (22 FCC Reports 342; J.A. 109-128) "deintermixing" Peoria, Ill.—by removing VHF Channel 8 from Peoria (a predominantly UHF area) and substituting UHF Channels 25 and 31 therefor, and reassigning VHF Channel 8 to Rock Island-Davenport-Moline (a predominantly VHF area). That Report and Order, as clarified on rehearing by Memorandum Opinion and Order adopted June 20, 1957 (23 FCC Reports 61), has in turn its antecedents which explain and (respondent believes) justify the actions here challenged, including the Commission's earlier decision granting Channel 8 to petitioner conditioned on the outcome of a then-pending proceeding to shift Channel 8 to the Rock Island area (J.A. 128-130, 11 RR 533, 607-608; J.A. 131-137, 22 FCC Reports 1039):

In its spectrum allocation report in 1945 the Commission made it clear that the 13 VHF channels (later reduced to 12), which it there set aside for commercial television use, were insufficient to provide a nationwide competitive television system (see J.A. 10, 13-14), and accordingly reserved a substantial portion of the UHF band for *experimental* television purposes.[1] In its Sixth Report of April 14, 1952, issued after a four-year study

[1] Report in FCC Docket No. 6651, Mimeo 82387, May 1945 (see 1 RR, Pt. III, pp. 91:97-98.

(1948-1952), the Commission added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels (Channels 2 through 13) theretofore set aside for regular television broadcast use (J.A. 13-14).[2] Basic to this latter report, allocating specific channels to named cities (see 1 RR ¶53:606), was the assumption (then justified but disproved by subsequent developments) that the "intermixture" and utilization of VHF and UHF channels in the same major markets would compel the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course "an integral part of a *single,* nationwide television service" (para. 197).[3]

Pursuant to the intermixture policy thus embodied in its 1952 Report, the Commission allocated one VHF (Channel 8) and two UHF channels (Channels 19 and 43) to Peoria, Ill., and two VHF (Channels 4 and 6) and two UHF channels (Channels 36 and 42) to Davenport-Rock Island-Moline for commercial use.

A VHF-UHF pattern developed in these two markets typical of the United States as a whole: In Peoria, with Channel 8 tied up in a comparative hearing, the two UHF stations went on the air in that market and provided the public with a satisfactory television service on UHF (J.A. 113-115, paras. 11-13). In Rock Island-Davenport-Moline, with two VHF stations already established, the UHF channels "went begging" (J.A. 123, para. 27). It soon became apparent (under the 1952 "intermixture" policy) that in the larger markets where *two* VHF stations were in operation, and in the smaller markets with the advent of a *first* VHF station, the UHF channels were not being utilized (see J.A. 47-48; J.A. 77-81). In short, unless cor-

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[2] See Sixth Report of April 14, 1952, 1 RR Pt. III, 91:606-607 (para. 22).

[3] Sixth Report of April 14, 1952, 1 R.R. Pt. III, 91:661-665. Emphasis supplied throughout this brief.

rective steps were taken, it was evident that the 70 UHF channels would go to waste (see J.A. 47-48).

Accordingly, commencing in 1954, the Commission was flooded with petitions proposing a basic change in allocation philosophy—from that of "intermixture" to a policy of "deintermixture"—in which it was urged that ungranted VHF channels in areas where UHF had proved successful be shifted to VHF areas where UHF stood no chance of gaining a toehold, thereby ensuring more service from UHF stations (in UHF areas) and more service from VHF stations (in VHF areas). Among such petitions were those by the two UHF stations in Peoria, asking that Peoria be made all-UHF and that Channel 8 be reassigned to the Rock Island area (see J.A. 79).

After a series of rule-making proceedings, the Commission finally concluded in its Second Deintermixture Report of June 26, 1956 in FCC Docket No. 11532 (J.A. 5-44; 13 RR 1571) that intermixture was not producing an integrated television system, that the 12 VHF channels were insufficient for a "fully competitive television system" (J.A. 10, para. 12), that VHF operations were thwarting the development of a satisfactory service on UHF in a number of markets, and that "the intermixture of UHF and VHF channels was, on a nation-wide basis, a failure" [1] Pending a further study of the advisability and feasibility of moving all television into the UHF band (thus eliminating the intermixture problem), the Commission also concluded (as an interim measure) that it would re-examine its 1952 allocations with a view to determining, on a case-to-case basis, whether the deletion of VHF channels in predominantly UHF areas would "improve the opportunities for effective competition among a greater number

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[1] See *Jacksonville Journal Co.* v. *Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F.2d 699, 700 (1957).

of stations" (J.A. 21, para. 31). To that end the Commission, concurrently with its June 26, 1956 Report, instituted some 13 rule-making proceedings designed to "deintermix" a number of areas where it appeared that UHF (if not smothered by VHF competition) would provide a satisfactory service (see J.A. 23-24). Among the proceedings thus instituted was one (FCC Docket No. 11749) to remove VHF Channel 8 from Peoria, substituting two additional UHF channels therefor, and utilizing Channel 8 in the Rock Island area, an important market which would otherwise be limited to two stations (J.A. 44-45).

In an interim report released July 23, 1956, the Senate Committee on Interstate and Foreign Commerce (which had been closely following the UHF-VHF deintermixture problem) strongly endorsed the Commission's action in FCC Docket No. 11532 and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted with a view to deintermixing particular markets. Sen. Rept. No. 2769, 84th Cong. 3d Sess.

American Broadcasting-Paramount Theatres, Inc. (ABC), a television network which has been handicapped by its inability to obtain "outlets" in two-station markets, comparable to those enjoyed by the other two networks (CBS and NBC), supported the Commission's rule-making proposal (FCC Docket No. 11749) to provide at least three stations (on UHF) in Peoria and at least three stations (on VHF) in the Rock Island-Davenport-Moline area (J.A. 112, para. 9).

After a careful study of the voluminous comments filed by interested persons in FCC Docket No. 11749, the Commission on March 1, 1957 released a Report and Order (J.A. 109-128; 22 FCC Reports 342) in which it found (in line with the five criteria spelled out in its Second Deintermixture Report) that the deletion of Channel 8 from Peoria would not result in any significant numbers of

people being deprived of a television service (J.A. 117, para. 17); that several stations were providing a UHF service to the area, including two stations in Peoria (J.A. 113-114, para. 11); that virtually 100% of the sets in the Peoria area were capable of receiving UHF signals (J.A. 114, para. 12); that the flat terrain of central Illinois was generally suited to UHF propagation (J.A. 115, para. 13); and that the deletion of Channel 8 would result in more service rather than less service in the Peoria market (J.A. 123-124, para. 29). The Commission accordingly concluded that the public interest would be served (1) by deleting Channel 8 from Peoria and substituting two UHF channels therefor, thus making that market all-UHF; and (2) by reassigning Channel 8 to Rock Island-Davenport-Moline (where it would provide a needed third service) (J.A. 123, para. 27).

On March 26, 1957, WIRL Television Company (which in the meantime, after a comparative hearing, had received a grant on Channel 8 in Peoria *subject to* the outcome of the then-pending rule-making proceeding to substitute a UHF channel therefor) sought review in the court below of the March 1 Report and Order (J.A. 109-126) under 47 U.S.C. Sec. 402(a) (Case No. 13768) and under 47 U.S.C. Sec. 402(b) (Case No. 13769). By Memorandum Opinion and Order released May 17, 1957 (J.A. 131-137; 22 FCC Reports 1039), the Commission (1) denied a petition for reconsideration theretofore filed in the comparative proceeding by WIRL Television Company (objecting to the conditions which the Commission had attached to the Channel 8 grant) and (2) granted WIRL Television Company a permit for Channel 25 in Peoria (J.A. 136). From that action, WIRL Television Company took a third appeal (Case No. 13912) on May 31, 1957, under 47 U.S.C. Sec. 402(b). By Memorandum Opinion and Order adopted June 20, 1957 (23 FCC Reports 61) the Commission reaffirmed its Report and Order of March 1, 1957 in Docket No. 11749, by denying a peti-

tion for reconsideration timely filed (under 47 U.S.C. Sec. 405) by another party to that proceeding.

Pursuant to 5 U.S.C. Sec. 1038 and 47 U.S.C. Sec. 402(e), respondent American Broadcasting-Paramount Theatres intervened in each of the three appeals in the court below. Although supporting the Commission's actions on the merits, ABC contended that WIRL's appeals challenging the rule-makinng action deleting Channel 8 from Peoria had been rendered premature by the petition for reconsideration timely filed by another party to that proceeding (with no appeal filed by WIRL subsequent to the denial of that petition for rehearing on June 20, 1957)—in view of express language which Congress added to 47 U.S.C. Sec. 405 in 1952, namely, that the 30-day period in which review (under 47 U.S.C. Sec. 402) *must* be filed or taken "*shall* be computed from the date upon which public notice is given of orders disposing of *all* petitions for rehearing filed in any case." The court below affirmed, without adverting to the jurisdictional question thus interposed.

ARGUMENT

I.

Proceeding in 1952 on the assumption (then by no means unjustified) that the allocation of VHF and UHF channels to the same markets would compel the manufacture of nothing but all-channel receivers, the Commission in its Sixth Report allocated both UHF and VHF channels in as many markets as possible.[1] But subsequent developments soon demonstrated that in smaller markets to which a single VHF channel was allocated, and in the larger markets where two VHF channels were in use, the 70 UHF channels were becoming "paper allocations" (see J.A. 8-9, 47-48, 78-80). Since the 12 VHF channels were

[1] Sixth Report of April 14, 1952, 1 RR Pt. III, 91:661-665.

inadequate by themselves to provide a nationwide competitive television service (J.A. 10; 13 RR 1571, para. 12), it was unthinkable that the 70 UHF channels should be allowed to go to waste. See Sen. Rept. No. 2769, 84th Cong. 3d sess.

Thus confronted with a situation where there were not enough VHF channels to go around, and with UHF channels not being utilized, it took no great acumen in 1956 to conclude, with 82 channels to work with, that the public would receive service from more stations if equally competitive UHF channels were used in areas where UHF was providing a satisfactory service, and if the VHF channels theretofore assigned to those areas (but still tied up in comparative hearings) were shifted to VHF markets where UHF had been unable to obtain a foothold. The Commission so concluded in its Second Deintermixture Report released June 26, 1956 in FCC Docket No. 11532 (J.A. 5-44; 13 RR 1571).

In line with that Report, the Commission instituted proceedings to deintermix the Peoria and Rock Island areas (FCC Docket No. 11749)—by removing Channel 8 from Peoria (substituting UHF channels therefor), and by reassigning Channel 8 to Rock Island, a market restricted to two stations (J.A. 46-47). On the basis of data there submitted, the Commission found that by removing Channel 8 from Peoria and substituting UHF channels therefor, and by reassigning Channel 8 to Rock Island-Davenport-Moline, each of those markets would have additional stations: Peoria would have three or more stations (on UHF), instead of a single station on VHF Channel 8; Rock Island-Davenport-Moline would have three commerial stations instead of two (J.A. 118, para. 18; J.A. 123-124, para. 29).

Despite the public interest benefits which would thus stem from deintermixing Peoria, petitioner argues (Pet. 13-21) that the Commission was foreclosed as a matter of law from taking the action which it did by reason of

Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)). Notwithstanding the admitted fact that the 12 VHF channels are not enough to provide a nationwide competitive television system, and notwithstanding the fact that UHF channels become "paper allocations" in markets the size of Peoria, when a VHF station commences operating therein, petitioner says (in effect) that a VHF channel must be assigned to Peoria by reason of Section 307(b), regardless of the public interest consequences and even though such an allocation results in less service rather than more service (Pet. 13-21).

Neither the Communications Act nor this Court's decisions impose any such "straitjacket" on the Commission. Section 303(g) of the Communications Act places upon the Commission the responsibility of encouraging "the larger and *more effective use* of radio in the public interest" (47 U.S.C. Sec. 303(g)). Here, the Commission found as a fact, fully supported by the record, that the deletion of the Channel 8 assignment in Peoria would result in more stations and more service in central Illinois (Peoria-Springfield-Decatur) than would its retention in that area (J.A. 113-114, para. 11; J.A. 117-118, para. 18; J.A. 123-124, para. 29). Accordingly, under the express authority contained in Section 303(g) of the Communications Act (47 U.S.C. Sec. 303(g)), the Commission was fully justified in deleting from Peoria the VHF channel which had been allocated to that market in 1952 on an assumption (since disproved) that VHF and UHF stations could exist side by side in the same market. *Second Report on Deintermixture,* 13 RR 1571 (1956). The Commission's action deleting Channel 8 from Peoria was fully warranted, if for no other reason than to improve the number of competitive television services in and around Peoria (central Illinois) even though the deleted VHF channel had been placed "on ice" without reassigning it elsewhere—as the Commission did in the *Vail Mills* and *Elmira* cases decided at the same time. 22 FCC Reports 293 (1957); 22 FCC Reports 307 (1957).

Petitioner is aggrieved by the action *deleting* Channel 8 from Peoria, and *not by its reassignment elsewhere.* What use is made of Channel 8, in the event the public interest (as the Commission found) would be better served by its non-utilization in the Peoria area, is of no moment to petitioner. Technically speaking, therefore, petitioner is in no position to raise a Section 307(b) question (based on the comparative needs of Peoria and Rock Island-Davenport-Moline), in view of the Commission's finding that the non-utilization of Channel 8 in Peoria would result in more service rather than less srvice in that area (J.A. 118, para. 18).

II.

But even assuming *arguendo* that petitioner is in a position to invoke Section 307(b), in view of the fact that the benefits which would accrue from the utilization of Channel 8 elsewhere was used by the Commission as an *additional* reason why Channel 8 should not remain in Peoria (J.A. 119, para. 20), the action here challenged implements rather than contravenes the Communications Act, including Section 307(b). An intermixed system of channel allocations where the net effect of a single VHF operation is to close down multiple UHF stations does not constitute an "*efficient,* and equitable distribution of *radio service*" within the meaning of Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)). UHF "paper allocations" do not constitute "radio service."

The Commission's authority, by prior rule-making proceedings to set aside one class of frequencies for "communities" of one type and a different class of frequencies for "communities" of another type has long been recognized. See *Huntington Broadcasting Co.* v. *Federal Communications Commission,* 89 U.S. App. D.C. 222, 192 F.2d 33 (1951). Thus, the Commission properly decided in FCC Docket No. 11532 (by its Second Report on Deintermixture) to make greater use of UHF channels in areas where

UHF is providing satisfactory service, and to shift VHF channels from such areas to VHF markets where UHF cannot hope to provide a competitive service (J.A. 21-24; 13 RR 1571). To that end, in the instant proceeding, it first decided to make Peoria all-UHF—by deleting Channel 8 in that area (J.A. 118, para. 18). But rather than allow the channel to go to waste, it was placed in a VHF area (Rock Island-Davenport-Moline) which was in need of additional service and where UHF "paper" allocations were not providing "radio service" (J.A. 123, para. 27).

In short, by deleting Channel 8 in Peoria (and substituting UHF channels therefor) and by reassigning that channel to Rock Island-Davenport-Moline), such action meant that Peoria would have three or more commercial stations (instead of one), and Rock Island-Davenport-Moline would have a third competitive service. In thus providing more television service to the public in those areas and more effective competition among all three networks, the Commission's action implemented rather than contravened the requirements of Sections 303(g) and 307(b) of the Act (47 U.S.C. Secs. 303(g) and 307(b)). This Court's decisions in the *Nelson Brothers, Allentown,* and *Sanders* cases, on which petitioner relies (Pet. p. 14), dealt with an entirely different problem and are in no way in conflict with the decision below.

III.

When, on June 26, 1956, the Commission released its Second Report on Deintermixture and decided to institute rule-making proceedings to deintermix 13 markets (J.A. 5-44, 13 RR 1571), petitioner had no vested rights in Channel 8 in Peoria. At that juncture petitioner was still an applicant for that frequency. Accordingly, with a rule-making proceeding pending looking toward the deletion of Channel 8 from Peoria and substituting UHF channels therefor (FCC Docket 11749), the Commission

on June 29, 1956, when it issued a decision preferring petitioner over its competitor in Peoria, granted Channel 8 to WIRL Television Company subject to the condition "that the Commission may, without further proceedings, substitute for Channel 8 such other channel as may be assigned to Peoria, Illinois instead of Channel 8 in the rule-making proceedings in Docket No. 11749, and subject to the further condition that no construction shall be commenced under the permit here granted until further order of the Commission to be issued subsequent to the conclusion of Docket No. 11749" (J.A. 129-130). Having concluded in Docket No. 11749 (J.A. 109-128) to delete Channel 8 and to substitute UHF Channels 25 and 31 therefor, the Commission on May 17, 1957 granted Channel 25 to petitioner (J.A. 136).

Section 303(r) of the Communications Act (47 U.S.C. Sec. 303(r)) empowers the Commission to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." Since the court will not "direct the order in which the Commission shall consider its cases,"[1] the Commission could have withheld action in the Channel 8 comparative hearing until the reallocation proceeding (Docket No. 11749) was resolved. It chose instead, for public interest reasons (J.A. 129-130), to resolve the Channel 8 comparative proceeding, but to condition its grant on the outcome of the reallocation proceeding. With such a condition attached to the grant, petitioner was not a "licensee" or "permittee" entitled to an evidentiary hearing under 47 U.S.C. Sec. 303(f) and 316 before its conditioned permit could be modified to specify the channel ultimately allocated to Peoria in lieu of Channel 8. Petitioner held a grant on Channel 8 expressly subject to the outcome of the deintermixture rule-making proceeding. Its comments

[1] *Federal Communications Commission* v. *Station WJR*, 337 U.S. 265, 272.

in that proceeding were duly considered by the Commission. Having had at no time an unconditioned license or permit for Channel 8, it cannot demand an "evidentiary hearing" under Section 303(f) and 316 of the Act. Thus, the Commission was free to determine what channels should be utilized in Peoria by rule-making proceedings, rather than by an evidentiary hearing. *Logansport Broadcasting Corp* v. *United States,* 93 U.S. App. D.C. 342, 210 F.2d 24 (1954).

CONCLUSION

The Commission's action here challenged was properly affirmed by the court below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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